84-741

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No.

In The
Supreme Court of the United States

October Term, 1984

JOHN R. CASSILIANO,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF RICHMOND.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's Sixth Amendment constituted tional right to be informed of the nature and cause of the criminal charges against him was violated by his indictment, trial and conviction of the crimes of receiving reward for official misconduct in the second degree, and official misconduct, allegedly committed between September 1, 1977 and March 31, 1979, a period of 577 consecutive calendar days, where no specific date or dates on which petitioner allegedly committed any such criminal act was alleged in the indictment, no bill of particulars stating any such date was served although the Court ordered the prosecutor to serve it, and accusing witnesses testified that they did not remember any such date?

2. Whether petitioner's 14th Amendment constitutional right to due process of law was violated by pervasive newspaper, radio and television publicity that the petitioner accepted bribes for permitting dumping of toxic wastes in a municipal landfill, without action by the trial court to protect the petitioner from such unfavorable publicity by adjourning the case until after such publicity abates, sequestration of the jury, transferring the case to another county, or directing a new trial?

The trial court (SANGIORGIO, J.) decided the above questions in the negative. The Appellate Division of the New York Supreme Court affirmed the judgment convicting the defendant of the said crimes, and an application for leave to appeal to the New York Court of Appeals was denied by the Chief Judge of that Court on August 6, 1984.

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1. Petitioner's Sixth Amendment constitutional right to be informed of the nature and cause of the criminal charges against him was violated by the superseding indictment, trial and conviction of the petitioner of the crimes of receiving reward for official misconduct in the second degree, and official misconduct, allegedly committed between September 1, 1977 and March 31, 1979, a period of 577 consecutive calendar days, without allegation in the superseding indictment of any specific calendar date on which petitioner allegedly committed any such criminal act. The prosecutor did not serve on the petitioner a bill of particulars stating any such specific calendar date, and accusing witnesses testified that they did not remember any such date. 12

2. Petitioner's Fourteenth Amendment constitutional right to due process of law was violated by pervasive

newspaper, radio and television publicity that the petitioner accepted bribes for permitting dumping of toxic wastes in a municipal landfill, without action by the trial court to protect the petitioner from such unfavorable publicity by adjourning the trial of the case until after such publicity abates, sequestration of the jury, transferring the case to another county, or directing a new trial 21

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

JOHN R. CASSILIANO

Petitioner,

v.

THE STATE OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF RICHMOND.

GROUNDS FOR INVOKING THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

(i) Date of Judgment or decree sought to be reviewed: Order by Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated and entered in the office of the Clerk of that Court on July 16, 1984, which unanimously affirmed a judgment of the Supreme Court of the State of New York, County of Richmond, entered in the office of the Clerk of that Court on January 3, 1983, which adjudged that petitioner is guilty of the crimes of receiving reward for official misconduct in the second degree, a class E felony, defined by section 200.25 of the Penal Law of the State of New York, and that he is also guilty of the crime of official misconduct, a class A misdemeanor, defined by section 195.00 of the said Penal Law.

(ii) An order was made by the New York Court of Appeals on August 6, 1984, which denied petitioner's motion for leave to appeal to the said Court of Appeals from the said Appellate Division order.

(iii) Statutory provision believed to confer on the Supreme Court of the United States jurisdiction to review the said order of the said Appellate Division of the Supreme Court of the State of New York by writ of certiorari: 28 U.S.C. Section 2104.

2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertainedby law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Subdivision 6 in section 200.50 of the New York State Criminal Procedure Law provides:

"An indictment must contain:
6. A Statement in each count that the offense charged-therein was committed on, or on or about, a designated date, or during designated period of time".

Subdivision 1 in section 240.20 of the New York State Criminal Procedure Law, in part, provides:

"1. Except to the extent protected by court order, upon a demand to produce by a defendant against whom an indictment, superior court information, prosecutor's information or information is pending, the prosecutor shall disclose to the defendant and make available for inspection, the following property:

(h) The approximate date, time and place of the offense charged and of defendant's arrest."

STATEMENT OF THE CASE

A. The Facts

On June 21, 1982, there was filed a superseding indictment of 24 counts. Count 2 accused the petitioner of receiving reward for official misconduct, a class E felony, defined by §200.50 of the Penal Law. Count 15 of the superseding indictment accused the petitioner of obstructing governmental administration, a Class A misdemeanor.

On October 25, 1982, as the trial was beginning, the Court granted the prosecutor's motion to amend count 15 to charge the petitioner with official misconduct, a Class

A misdemeanor. The superseding indictment alleged that such crimes were committed between September 1, 1977 and March 31, 1979.

Previously, on Februrary 16, 1982, petitioner was indicted on 12 counts, which accused the petitioner of rewarding official misconduct in the second degree, a Class E felony, defined by §200.20 of the Penal Law; giving unlawful gratuities, a class A misdemeanor, defined by §200.30 of the Penal Law; and official misconduct, a class A misdemeanor, defined by §195.00 of the Penal Law.

By an order dated May 5, 1982, the Trial Court granted petitioner's motion for a bill of particulars stating, among other things, the "date it is alleged that the defendant committed the offense" (A43). The prosecutor never served and filed such bill of particulars.

Section 240.20(h) of the Criminal Procedure Law required a prosecutor to disclose to a defendant:

> "The approximate date, time and place of the offense charged and of defendant's arrest."

Section 200.95(6) of the Criminal Procedure Law provided that:

"the prosecutor must file with the court a bill of particulars reciting every item of information designated in the order, and serve a copy thereof upon the defendant. Pending such filing and service the proceedings are stayed."

The criminal charges against the petitioner alleged, in substance, that he permitted dumping of waste oil in Brookfield landfill on Staten Island during the 12:00 to 8:00 A.M. work shift; and that as Senior Superintendent in charge of Plant No. 1 in Staten Island, he did not pro-

perly perform his duty to check other installations in Staten Island, including Brookfield which had no supervisor present during the 12:00 to 8:00 A.M. work shift, to see that required equipment and personnel were present and functioning; and that he accepted money for permitting dumping of waste oil in Brookfield, and directing a subordinate to dig a hole in Brookfield for burial of liquid waste therein. Petitioner was not able to prepare and to present a defense that his signatures in the Brookfield time book showed that he was not present in Brookfield on the dates alleged by the indictment, or by accusing witnesses.

Petitioner contends that the absence of an allegation in the indictment that the petitioner committed the aforesaid criminal acts on one or more specific calendar dates, the absence of oral testimony by the accusing witnesses that the petitioner committed the aforesaid criminal acts on one or more specific calendar dates, and their testimony that they did not remember any specific calendar date on which petitioner allegedly committed such crimes, prevented the petitioner from preparing and presenting evidence that he did not commit such crimes on the indefinite dates alleged in the indictment and testified to by accusing witnesses, and thereby invalidated the indictment and conviction of the petitioner of such crimes:

> "during the period from on or about September 1, 1977 to on or about March 31, 1979".

a period of 577 consecutive calendar days, because it lacked specificity in stating the date on which the offense was committed; and that the time from September 1, 1977 to March 31, 1979, consisting of 577 consecutive calendar days, was unreasonably long, and made it impossible to prepare and to present a defense to disprove allegations in the superseding indictment and testimony by prosecution witnesses that the petitioner committed criminal acts of accepting money for permitting the dumping of liquid waste

at Brookfield, and directing a subordinate to dig a hole in the active garbage bank at Brookfield between September 1, 1977 and March 31. 1979.

At Petitioner's trial, six witnesses whom the Trial Court designated as accomplices, and who received immunity from prosecution for crimes committed by them which they admitted, testified against the petitioner.

Anthony Socci, a Tractor Operator employed at Brookfield on the midnight to 8 A.M. shift, testified that some time in 1977, on a date which he did not remember the petitioner asked him to dig a hole with a tractor in the garbage bank at Brookfield, for use in dumping waste oil in such hole by private oil company tanker trailer trucks; that petitioner paid Socci small sums of money for digging such holes, aggregating about $200 for about 15 such holes dug between 1977 and 1978 (A73-205); and that he did not remember any specific calendar dates or any specific amounts of money given him by petitioner (A73-205).

On cross-examination, Socci testified that petitioner told him to dig holes in the garbage bank in "summer time or autumn" (A114), but he previously testified before the grand jury that he only dug holes in the winter time"That's the only time that they had a night tractor operator, during the winter months for the snowplow" (A115); and that petitioner "probably suggested an area" in which Socci shall dig a hole (A118), but he previously told the grand jury that petitioner did not tell him where to dig a hole (A119). Socci told the grand jury that the first hole he dug was five or six feet wide (A123), but he previously testified at a hearing of civil service disciplinary charges against the petitioner that the first hole he dug was twelve feet wide (A123--124).

New York City's Department of Sanititation made excavations, borings and other physical examinations of

sites to which Socci pointed that he dug holes there for dumping waste oil therein, but no physical evidence was found that waste oil was dumped there (A171).

Again, recently, in 1984, the Department of Sanitation had a six foot deep trench dug across Brookfield for a pipe line, without finding any trace of waste oil dumped in Brookfield.

Socci's testimony that waste oil was dumped in holes he dug near the active garbage bank at Brookfield was contradicted by another accomplice, Sanitation Foreman Philip Aiello, who was given immunity from prosecution, and who testified before the grand jury (A337):

"Q. What did the tank trucks do on the active bank?
A. They just spread their oil and water up all over the place."

Q. On the bank?
A. Right, sir.

Q. How did they do that?
A. Opened up their valves and just let it go.

Q. Did you ever see the tank truck dump into any holes?
A. No."

Undisputed testimony by John Rubino, Director of the Bureau of Waste Disposal, was that until November, 1979, spreading oil and water on dirt roads at the active garbage bank at landfills was an accepted and approved practice (A366-368).

Frank Crone, a truckdriver employed by Northeast Oil Co., testified that "we would wait for Johnny to come and he would give us a flashlight to come on up when the hole was dug up there on top" (A124), but he contradicted

himself by also testifying that "Johnny would come by and take us on up or wave us on up and show where the hole was" (A259), but such testimony was contradicted by another accomplice, Anthony Socci, who testified:

"Q. Did anyone have any lighting devices?
A. I had them on; my bulldozer has got four lights on it.

Q. Did you do anything with those lights?
A. Yes. I showed them where to dump."(A91)

Frank Crone testified he did not remember dates as follows:

"The dates, I can't remember, but, I mean, it was quite a few occasions where I was to take it over there and dump it..'76, '77, '78 and '79" (A212).

"I can't remember, dates and stuff like that." (A218).

"The season, I can't remember, I mean, with these conversations, like I told you. I 'm not so good for dates or anything like that." (A218))

"The dates, I can't remember, I don't remember dates. Again, even the year." (A226).

Frank Crone disregarded instructions given him by the District Attorney and testified that he dumped "toxic waste" in Brookfield (A218). The Trial Court denied petitioner's motion for a mistrial (A222), to which petitioner took exception (A222).

James Carruthers, another truckdriver employed by Northeast Oil Co., testified "I met Johnny Cash every time I went to the dump" and that Carruthers talked to petitioner "Practically every time I went to the dump"

(A314-315); but Carruthers was not able to point out the petitioner in the courtroom (A315), and in the District Attorney's office he picked "someone else" from photographs shown to him by the District Attorney (A315-316).

Kenneth Mansfield, a truck driver employed by Newtown Oil Co., testified (A434):

> "Q. Isn't it a fact you cannot give us, with any specificity, any telelphone conversation you had with Cassiliano? Isn't that true?
> A. I cannot give you the day or the time."

Edith Gittleman, a bookkeeper for Newtown Oil Co., testified that she wrote and signed checks drawn on a Northeast Oil Co., bank account which she cashed herself, or Fred Boehm emloyed in the same office went to the bank and obtained the cash which he gave her; and that she gave some of that cash to petitioner for allowing trucks of Northeast Oil Co., to dump waste oil in Brookfield (A485-489). She testified that the checks she signed and cashed at the bank were burned by her boss, Russell Mahler, owner of Northeat Oil Co., (id.). The Bank's photocopies of such checks were not produced at the trial. Independent accountants who examined the financial records of Northeat Oil Co., were not subpoenaed to testify at the trial, and their records were not produced at the trial, Miss Gittleman testified that she could not remember the dates on which she gave money to petitioner or the amounts she gave him (A461-492). She testified:

> "Q. Tell us when was the first time you ever gave one penny to the defendant in this case, Miss Gittleman?
> A. I don't remember.

Q. How about the second time?
A. I don't remember." (A461-462).

Q. ...When was the last time that you gave money to the defendant?
A. I don't remember." (A492).

B. Proceedings Below

On February 16, 1982, a 12-count indictment was filed in Richmond County, New York, which accused the petitioner of rewarding official misconduct, giving unlawful gratuities, and official misconduct, by giving money to a Tractor Operator employed by the City of New York at Brookfield landfill between September 1, 1977 and March 31, 1979, for excavating holes in the active garbage bank at Brookfield into which oil trucks later dumped waste oil, and by permitting oil trucks to dump waste oil in Brookfield. Petitioner pleaded not guilty, and he was released on $2,500 bail.

A court order, dated May 5, 1982, directed the prosecutor to serve and file a bill of particulars stating, among other things, "the date it is alleged that the defendant committed the offense". The prosecutor never served and filed such bill of particulars.

On June 21, 1982, a superseding indictment of 24 counts was filed, which accused the petitioner, among other things, of receiving reward for official misconduct, and official misconduct. Petitioner pleaded not guilty, and his bail was continued. No bill of particulars was served and filed stating the dates or approximate dates on which petitioner allegedly committed the crimes charged. Petitioners's liberty on bail was continued until the trial.

The superseding indictment was tried from October 25, 1982 to November 11, 1982, when a jury found the petitioner guilty of receiving reward for official misconduct and official misconduct; and it found the petitioner not guilty of the remaining charges in the superseding indictment.

On January 3, 1983, the Trial Court gave judgment that the petitioner was guilty of receiving reward for official misconduct, and official misconduct; and it sentenced the petitioner to imprisonment for an indeterminate term with a maximum of three years and minimum of one year and a $5,000 fine for receiving reward for official misconduct, and imprisonment for one year for official misconduct, such sentence to run concurrently with the sentence for receiving reward for official misconduct. Petitioner's bail was continued pending appeal.

Petitioner appealed to the Appellate Division, Second Deparment of the New York Supreme Court, which affirmed the judgment by an order dated July 16, 1984, and said in an accompanying memorandum decison that the susperseding indictment was sufficiently specific under the circumstances of this case.

Petitioner applied to the Court of Appeals of the State of New York for leave to appeal to that Court, but that application was denied on August 6, 1984. No other or further appeal to any New York court is available to petitioner under the New York Constitution and statutes.

On September 21, 1984, the Trial Court (SANGIORGIO, J.) remanded the petitioner to prison, where he is now serving his sentence of imprisonment.

On July 21, 1984, petitioner filed in the United States District Court, Eastern District of New York, a petition for a writ of habeas corpus which alleged that his impending imprisonment would deprive him of his federal constitutional rights under the Sixth and Fourteenth Amendments to the Constitution of the United States to be informed of the nature and cause of the criminal charges against him and to due process of law.

On October 1, 1984, the District Court (COSTANTINO, J.) dismissed the petition.

REASONS FOR GRANTING THE WRIT

1. Petitioner's Sixth Amendment constitutional right to be informed of the nature and cause of the criminal charges against him was violated by the superseding indictment, trial and conviction of the petitioner of the crimes of receiving reward for official misconduct in the second degree, and official misconduct, allegedly committed between September 1, 1977 and March 31, 1979, a period of 577 consecutive calendar days, without allegation in the superseding indictment of any specific calendar date on which petitioner allegedly committed any such criminal act. The District Attorney did not serve on the petitioner a bill of particulars stating any such specific calendar date and accusing witnesses testified that they did not remember any such date.

The District Attorney did not comply with a court order which directed him to serve and file a bill of particulars stating specific calendar dates on which petitioner allegedly committed such criminal acts, but the District Attorney did not comply with such court order; and section 200.95(6) of the New York State Criminal ProcedureLaw provided that the prosecutor:

"Must file with the court a bill of particulars reciting every item of information designated in the order, and serve a copy thereof upon the defendant. Pending such filing and service, the proceedings are stayed."

The prosecutor never served a bill of particulars stating the date or approximate date, on which the petitioner allegedly committed the said crimes. However, the trial was not stayed, although it should have been stayed.

On October 25,1982, as the trial was about to begin, petitioner's attorney asked the Trial Court (RA6):

"I would ask again, at this time, that the People furnish me with the approximate dates so that the defendant Cassiliano might properly defend himself in this Court-house, and without these dates the defendant is at a loss and cannot properly defend himself."

The prosecutor replied (RA7):

"We are unable to be any more specific than those dates, which are presently set forth in the indictment, and I submit to your Honor that the requirements of the contents of an indictment say that it is permissible for the People to state that the crimes charged took place during a period of time as opposed to on a specific date."

The provision in section 200.50(6) of the New York Criminal Procedure Law that an indictment must contain:

"A statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time",

was interpreted as not permitting an allegation in an indictment that a crime was committed during more than a reasonable span of time.

In *People v. Morris,* 61 N.Y. 2d 290, 473 NYS2d 769, 772, the Court said:

> "It may be that the interval ascribed for a particular crime is so excessive that, on its face, it is unreasonable and dismissal should follow."

Thus, the Court said in the *Morris* case, *supra,* that an indictment can not constitutionally allege that a crime was committed during an excessive period of time; and that in such a case, the indictment is unreasonable on its face and dismissal should follow.

Section 240.20(h) of the New York Criminal Procedure Law required a prosecutor to disclose to an accused:

> "The approximate date, time and place of the offense charged and of defendant's arrest",
>
> without an alternative provision permitting a prosecutor to state in a bill of particulars "a designated period of time", instead of "the approximate date".

A "Practice Commentary" on section 240.20(h) in McKinney's New York Criminal Procedure Law by Professor Bellacosa reads:

> "New Paragraph (h) is a mere precautionary redundancy. If the indictment and bill of particulars do not disclose the approximate date, time and place of offense and of arrest, if different, then discovery of it must be provided via this paragraph."

The Appellate Division of the New York Supreme Court sustained the indictment, and said (Appendix B, p. 2):

> "We find that the superseding indictment which alleged, inter alia, that on or about September 1, 1977, to on or about March 31, 1979, defendant, then a salaried supervisory employee of the Department of Sanitation, in exchange for money from certain named waste transporters, arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill in Staten Island, was sufficiently specific under the circumstances of this case (see *People v. Morris,* 61 NY2d 290).
>
> In *Morris (supra)* the Court of Appeals stated that an indictment should not be dismissed as defective with respect to the time period alleged for the commission of a crime, if it provides a reasonable approximation, under the circumstances of the individual case, of the date or dates involved. The court made clear that in an indictment a designated period of time, as opposed to a specific date, may be set forth (CPL 220.50], subd 6), and set out the standards to be applied in determining whether an indictment should be dismissed for failure to sufficiently detail when a crime was allegedly committed."

In *People v. Morris,* 61 NY2d 290, 473 NYS2d 769, the interval of time alleged in the indictment was only 24 days, from November 7, to November 30, 1980. In this case, in contrast, the interval of time alleged in the indictment was 577 days, from "on or about September 1, 1977 to on or about March 31, 1979."

In *People v. Morris,* 61 NY2d 290, 473 NYS2d 769, 772, the Court said that in addition to complying with the statutory requirements for an indictment under CPL §200.50, subds, 6, 7, the Sixth Amendment to the Constitu-

tion of the United States requires that an indictment shall protect an accused person's constitutional right "to be informed of the nature and cause of the accusation"; and that this consitutional requirement is satisfied if an indictment "contains such description of the offense charged as will enable (defendant) to make his defense and to plead the judgment in bar of any further prosecution of the same crime", citing *Russell v. United States,* 161 U.S. 29, 34 (1895), and *Russell v. United States,* 369 U.S. at 763-764, (1961).

In this case, the superseding indictment, the bill of particulars, and the testimony of accusing witnesses did not comply with the constitutional requirements laid down in the *Rosen* and *Russell* cases, *supra,* in that the superseding indictment did not describe the offenses of receiving reward for official misconduct, and official misconduct by merely stating that the petitioner committed those offenses, without stating the dates or approximate dates on which petitoner allegedly committed such offenses, and without any other statement or description of such offenses to enable petitioner to make his defense.

In *United States v. Cruikshank,* 92 U.S. 542, 566 (1875), the Court said that in order for an accused to make his defense "with all reasonable knowledge and ability", and in order for an accused to be provided with "full notice of the charge", the indictment should "charge the time and place and nature and circumstances of the offense with clearness and certainty". See, also: *United States v. Weiss,* 491 F.2d 460, 466 (2d Cir., 1974); *United States v. Salazar,* 485 F. 2d 1272, 1277 (2d Cir., 1973).

Citing *United States v. Bagaric,* 706 F 2d 42, 61 (2d Cir., 1983); *United States v. Tramunti* 513 F. 2d 1087, 1113 (2d cir., 1975); and *United States v. Salazar, supra,*

485 F 2d 1272, 1277 (2d Cir., 1973), the decision in *People v. Morris, supra,* 61 NY2d 290, said that when time is not an essential element, the indictment is often permitted to state the time in approximate terms, and that determination must be made on an *ad hoc* basis by considering all relevant circumstances whether an indictment and bill of particulars have given an accused person sufficient specificity to enable him to adequately prepare a defense.

In this case, the superseding indictment did not state the date of the offenses in approximate terms, by stating that they were committed "during the period from on or about September 1, 1977 to on or about March 31, 1979". This allegation did not give the petitioner any information about which one or more specific calendar dates during the 577 consecutive calendar dates embraced by the indictment, the accused allegedly committed one or more criminal acts of receiving reward for official misconduct, or official misconduct. A period of time from September 1, 1977 to March 31, 1979, is not a statement "in proximate terms" of a date of commission of a criminal act. It was impossible for the petitioner to be informed by the superseding indictment and bill of particulars on which one or more specific calendar dates during the 21 month period between September 1, 1977 and March 31, 1979, the indictment charged him with one or more acts of receiving reward for official misconduct, or official misconduct.

The prosecutor did not meet his constitutional burden to present evidence during the trial that he made diligent efforts to obtain from the accusing witnesses more specific information of the actual dates, or approximate dates, on which the petitioner allegedly committed the crimes of which he was found guilty, instead of accepting their testimony that they did not remember such dates.

In *People v. Morris, supra,* 61 NY2d 290, the Court said that consideration should be given to the tender age of the children who were the accusing witnesses in that case, In this case, the accusing witnesses testified that they were accomplices who aided and abetted the petitioner in his commission of the offenses of which he was convicted. But such accomplices did not testify about the surrounding circumstances, and they said they did not remember any specific date.

The prosecutor presented no evidence on these matters. The Court shut off discussion of petitioner's application for specific dates, and said (RA7):

"If he doesn't have them, he doesn't have them."

The prosecutor did not ask accusing witnesses any questions to refresh their recollection of the date, or approximate date, on which petitioner allegedly committed the crime of receiving reward for official misconduct, or official misconduct; and he did not ask such accusing witnesses any questions about physical facts, circumstances and occurrences at or near the times and places at which petitioner allegedly committed one or more such criminal acts.

As a result, the inculpating testimony of the accusing witnesses was limited to short, dry narrative statements by three drivers of oil tanker trucks (Frank Crone; James Carruthers; Kenneth Mansfield), that they drove their trucks to Brookfield landfill, where they opened the petcocks and the liquid flowed out into holes dug by Anthony Socci, a City-employed tractor operator, who gave equally limited testimony about time, place and circumstances of his activities at Brookfield landfill (A76-A205). Edith Gittleman, the alleged pay mistress for these activities

limited her testimony to stating that she gave money to the petitioner, and that she did not remember any date, or any amount of money she gave, or any surrounding circumstances. (A445-A504).Graphic demonstration of the unreliability of such evidence to support conviction of the petitioner was given by James Carruthers' testimony that he saw the petitioner at Brookfield daily, but he was not able to point out the petitioner in court during the trial; and before the trial in the District Attorney's office he picked a photograph of another man as that of the petitioner (A314-315).

Such vague, indefinite and uncertain evidence is legally insufficient to constitute substantial evidence that petitioner committed the crimes charged; and it unconstitutionally deprives the petitioner of liberty without due process of law.

Oral testimony at the trial by accusing witnesses that they have forgotten and they no longer remember the dates, or even the approximate dates on which the petitioner committed the crimes of receiving reward for official misconduct and official misconduct constitutes legally insufficient evidence that the petitioner committed such crimes:

> "during the period from on or about September 1, 1977 to on or about March 31, 1979".

Evidence of the date or the approximate date of commission of a crime is an essential and indispensable element of the accusation and of the finding that the accused committed the crime charged. Without evidence of the date, or the approximate date of commission of a crime, an indictment, and a judgment convicting an accused of a crime are invalid for vagueness and indefiniteness.

Such evidence amounts to no evidence that the accused committed the crime charged, and it requires dismissal of the indictment for lack of evidence.

On appeal to the Supreme Court of the United States, such a case presents a constitutional question "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 318 (1979).

In *Thompson v. Louisville,* 362 U.S. 199, 206 (1960). the Court said that it is a "a violation of due process to convict and punish a man without evidence of his guilt."

The provision in 22 USC §2254(d) that:

> "....a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction....shall be preseumed to be correct....unless the existence of one or more of the circumstances respectively set forth in paragraphs (l) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph 8 that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination. . . ."

does not require federal courts to presume the correctness of the judgment of conviction of the petitioner of the crimes of receiving reward for official misconduct in the second degree, a Class E felony, defined by §200.25 of the New York Penal Law, and of the crime of official misconduct, a Class A misdemeanor, defined by §195.00 of the New York Penal Law, because the jury could not constitutionally find as a fact that the petitioner committed the said crimes without evidence that on a specific calendar date, or approximate date, the petitioner committed such

crimes; and without such evidence, the jury's verdict, and the judgment of conviction based thereon unconstitutionally deprive the petitioner of his liberty without due process of law contrary to the 14th Amendment to the Consititution of the United States.

2. Petitioner's 14th amendment constitutional right to due process of law was violated by pervasive newspaper, radio and television publicity that the petitioner accepted bribes for permitting dumping of toxic wastes in a municipal landfill, without action by the trial court to protect the petitioner from such unfavorable publicity by adjourning the trial of the case until after such publicity abates, sequestration of the jury, transferring the case to another county, or directing a new trial.

Before the trial, and during the trial, the "STATEN ISLAND ADVANCE" daily published and distributed as news, charges attributed by it to un-named persons that the petitioner received large sums of money from oil companies as bribes for allowing their oil trucks to dump toxic chemicals and oil wastes in Brookfield landfill.

Guy Molinari, then a Republican candidate for Congress, published and distributed to owners of new homes in the Arthur Kill area of Staten Island which is near to Brookfield landfill, leaflets and fliers which accused the petitioner of damaging the environment by permitting the dumping of poisonous chemicals and wastes in Brookfield landfill.

Radio and television newscasts daily broadcast statements that the petitioner was indicted for accepting bribes for allowing the dumping of poisonous chemicals and wastes in Brookfield landfill.

As jury selection was about to begin, petitoner's attorney asked the Trial Court to read and consider (RA3-4):

> "approximately thirty to fifty articles talking about this particular case, and talking about the problem with toxic waste.
>
> In addition, I have a flyer from a gentleman by the name of Molinari, who is running for public office.
>
> In that article, it refers to my client as having been indicted and convicted of dumping toxic waste or permitting the dumping of toxic wastes here on Staten Island.
>
> In light of the publicity, I submit the unfair publicity that has been engendered by a consistent and systematic reporting of this case in the Advance, and, more particulary, the highly inflammatory piece of political literature that has been circulated by this gentleman running for public office, I would submit at this time that the defendant, unfortunately, cannot get a fair trial as far as the jurors are concerned, because of what has transpired.
>
> I would ask your Honor to consider this application, and in the interest of justice, to permit an adjournment and/or a continuation of this trial, until some time after December of this year, in the hopes that the public attention that has been received may subside so that we might be able to find jurors who would be fair and impatial...."

While the trial was going on, from October 25, 1982 to November 11, 1982, the Trial Court took no action to control or to limit the stream of newspaper, radio and television statements which accused the petitioner of accepting bribes for permitting the dumping of poisonous chemicals in Brookfield landfill.

The saturation of the minds of the people in Staten Island, including the jurors, with such repeatedly published accusations, poisoned the minds of the jurors, denied to the petitioner a fair trial, and deprived him of his constitutional right to due process of law.

In *Irvin v. Dowd,* 366 U.S. 717, 729-730, (1960), a concurring opinion by Justice Frankfurther stated:

> "How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constituted denial of due process of law in its most rudimentary conception."

In *Sheppard v. Maxwell,* 384 U.S. 333, 362-363 (1965, the Court said:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances . . . in addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered."

Petitioner's counsel asked the Trial Court (RA4);

> "to permit an adjournment and/or a continuation of this trial, until some time after December of this year, in the hopes that the public attention that has been received may subside so that we might be able to find jurors who would be fair and impartial."

In *Sheppard v. Maxwell,* 384 U.S. 333, 364 (1965) the Court said:

"But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."

The Trial Court did not grant petitioner's above-quoted application for protection from pervasive prejudicial publicity, which continued during the trial (A240-244).

As to prejudicial publicity during the trial, the Supreme Court said in *Sheppard v. Maxwell, supra, 384 U.S. 333:*

"If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

October 28, 1984.

Respectfully submitted,

MORRIS WEISSBERG
Attorney for Petitioner

APPENDIX A—JUDGMENT OF CONVICTION AND SENTENCE OF IMPRISONMENT BY SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF RICHMOND

Sentence

Of course, the Court has deliberated greatly on this matter, Mr. Lombardino, and has carefully read and reviewed the probation report in this case and has read each and every letter which was received, which was in excess of twenty, including a small book and a poem written for Mr. Cassiliano, and these letters, of course, were received from friends and associates of this man from all walks of life, attesting to the good character and decency of the defendant.

Further, this Court has been able to form to an extent that is, an opinion of the defendant' character from my observations during the course of the trial.

Although I am impressed with what I observed and what I've read in those letters, that John Cassiliano is a decent family man who has been loyal to the City of New York for a period in excess of twenty years, that the crime he was convicted of was not a violent crime, and that this is his first offense and he is not—he does not have a background of criminality; however, I have no choice but also to consider the stark facts in this case, and that is that Mr. Cassiliano's crime was an on-going crime. It was not just an isolated incident.

According to the testimony, it spanned for over, approximately a year and a half. And each time that the defendant allowed the dumping of waste, some being toxic, he did so deliberately, even knowing full well the consequences of his acts or not caring, and he was motivated by

greed. And although the exact amount of enrichment gained by the defendant in this case is undetermed, according to what the testimony revealed, it is likely that it was substantial, and that the harm that was done, that is the dumping of unauthorized liquid waste, being toxic or non-toxic, cannot be undone.

The defendant in this case has betrayed his public trust as evidenced, and he has evidenced a complete disregard for the health and safety of this community.

Lastly, the ramifications of this crime are widespread and serious, and in the interest of insuring the public safety, there must necessarily be sanctions in order to deter this type of conduct in the future.

Accordingly, the Court will now impose sentense with respect to the crime of receiving reward for official misconduct this is an E felony.

It is the judgment of this Court that the defendant be sentenced to an indeterminate sentence of imprisonment which shall have a maximum period of three years, and the Court imposes a minimum period of imprisonment of one year. And in addition thereto, the Court further imposes a fine in the amount of five thousand dollars.

With respect to the crime of official misconduct which is a misdemeanor, it is the judgment of this Court that the defendant be sentenced to a definite sentence of imprisonment for a term of one year which is to run concurrently with the sentence already imposed for the crime of receiving reward for official misconduct.

Any applications at this time?

MR. LOMBARDINO: Yes, The defendant does have an application.

I would like the record to be clear that I am not asking this Court for a stay pending appeal. I am not doing that. As a matter of fact, I am going to go to the Appellate Division to make that request seeking that relief.

However, I do ask the Court to consider granting the defendant a two week adjournment to surrender, so that I can go to the Appellate Division and seek a stay pending appeal from the Appellate Division, Second Department.

THE COURT: Do you want to be heard on that?

MR. MURPHY: People have no objection to that.

THE COURT: All right.

It seems to me that the defendant has no reason to abscond, and as discussed in chambers, there may be a novel question of law which the Appellate Division may want to entertain at this time. Since there is no objections by the District Attorney, the sentence is stayed until January 18, 1983.

MR. LOMBARDINO: Thank you.

APPENDIX B—ORDER OF APPELLATE DIVISION OF NEW YORK SUPREME COURT, SECOND JUDICIAL DEPARTMENT, JULY 16, 1984, AFFIRMING JUDGMENT OF CONVICTION

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Deparmtnet. held in Kings County on July 16, 1984

HON. LAWRENCE J. BRACKEN, Justice Presiding,
HON. JAMES F. NIEHOFF,
HON. ISAAC RUBIN,
HON. CHARLES B. LAWRENCE. Associate Justices

The People of the State of New York.

Respondent.

v.

John Cassiliano,

Appellant.

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named John Cassiliano, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Richmond County, rendered January 3, 1983, convicting him of the crimes of receiving reward for official misconduct in the second degree and official misconduct, upon a jury verdict, and imposing sentence; and the said appeal having

been argued by Anthony V. Lombardino, Esq., of counsel for the appellant, and argued by Karen F. McGee, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, and the case is hereby remitted to the Supreme Court, Richmond County, for further proceedings pursuant to CPL 460.50 (subd 5).

Enter:
IRVING N. SELKIN

Clerk of the Appellate Division

APPENDIX C—MEMORANDUM DECISION OF APPELLATE DIVISION OF NEW YORK SUPREME COURT, SECOND JUDICIAL DEPARTMENT, JULY 16, 1984, AFFIRMING JUDGMENT OF CONVICTION

LAWRENCE J. BRACKEN, J.P.
JAMES F. NIEHOFF,
ISAAC RUBIN,
CHARLES B. LAWRENCE, JJ.

——AD2dA—— April 5, 1984

2566E The People, etc., respondent v. John Cassiliano, appellant.
(Ind. No. 425/82)

Anthony V. Lombardino, Kew Gardens, N.Y. (Morris Weissberg of counsel). for appellant.

William L. Murphy, District Attorney, Staten Island, N.Y. (Karen F. McGee of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Richmond County (SANGIORGIO, J.), rendered Janaury 3, 1983, convicting him of the crimes of receiving reward for official misconduct in the second degree and official misconduct, upon a jury verdict, and imposing sentence.

Judgment affirmed, and the case is remitted to the Supreme Court, Richmond County, for further proceedings pursuant to CPL 460.50 (subd 5).

We find that the superseding indictment which alleged. *inter alia,* that on or about September 1, 1977, to on or about March 31, 1979, defendant, then a salaried supervisory employee of the Department of Sanitation, in

exchange for money from certain named waste transporters, arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill in Staten Island, was sufficiently specific under the circumstances of this case (see *People v. Morris,* 61 NY2d 290).

In *Morris (supra)* the Court of Appeals stated that an indictment should not be dismissed as defective with respect to the time period alleged for the commission of a crime, if it provides a reasonable approximation, under the circumstances of the individual case, of the date or dates involved. The court made clear that in an indictment a designated period of time, as opposed to a specific date, may be set forth (CPL 200.50, subd 6), and set out the standards to be applied in determining whether an indictment should be dismissed for failure to sufficiently detail when a crime was allegedly committed.

In applying the *Morris* standards, we note that:

The defendant was charged with continuing and clandestine offenses. The dates are not material elements of the crimes. It is not disputed that the witnesses were unable to provide the precise dates and hours involved, and there is no allegation of bad faith on the part of the People. Moreover, defendant was informed of the nature of the charges, the conduct underlying them, the time span within which they were committed, and the place of the crimes. Thus, the indictment provided reasonable and adequate notice and defendant was not prevented from preparing a defense on the merits, notwithstanding that it would have been easier to prepare and alibi defense if the exact dates and times of the offenses were known and provided. Additionally, the indictment contained such other

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particularity so as to provide defendant with the means of preventing a subsequent prosecution for the same charges.

We have considered defendant's other contentions and find them to be without merit.

BRACKEN, J.P., NIEHOFF, RUBIN AND LAWRENCE, JJ., CONCUR.

July 16, 1984-PEOPLE v. CASSILLIANO, JOHN-2566E

APPENDIX D—CERTIFICATE OF COURT OF APPEALS OF THE STATE OF NEW YORK, AUGUST 6, 1984, THAT LEAVE TO APPEAL TO THE COURT OF APPEALS IS DENIED.

STATE OF NEW YORK

COURT OF APPEALS

BEFORE HON LAWRENCE H. COOKE, CHIEF JUDGE

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

John Cassiliano,

Appellant.

CERTIFICATE DENYING LEAVE

I, LAWRENCE H. COOKE, Chief, Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Monticello, New York
August 6, 1984

s/Lawrence H. Cooke,
Chief Judge

Office-Supreme Court, U.S.
FILED
JAN 8 1985
ALEXANDER L. STEVAS,
CLERK

No

In the Supreme Court of the United States

October Term, 1984

JOHN R. ANO,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND RESPONDENT'S APPENDIX

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B. The record flatly contradicts petitioner's allegation that the trial court ordered the prosecutor to serve and file a bill of particulars with precise dates. In any event, the questions as to whether the state courts correctly interpreted Articles 200 and 240 of New York's Criminal Procedure Law and the New York Court of Appeals' decision in *People v. Morris* are ones of state—not Federal Constitutional—law 8

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In The
Supreme Court of the United States

October Term, 1984

JOHN R. CASSILIANO,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

OPINIONS BELOW

Petitioner's convictions of Receiving Reward for Official Misconduct in the Second Degree and Official Misconduct were affirmed on July 16, 1984, by a unanimous, four-judge panel of the Appellate Division, Second Department; the opinion is reported at 103 A.D.2d 806 and at 477 N.Y.S.2d 435.

On August 6, 1984, Hon. Lawrence H. Cooke, the Chief Judge of New York's Court of Appeals, denied petitioner's application for leave to appeal to the State's highest court [63 N.Y.2d 704].

STATEMENT OF THE CASE

John R. Cassiliano, the petitioner herein, was formerly the highest ranking supervisor for the New York City Sanitation Department on Staten Island. He stands convicted, following a trial by jury in the Supreme Court of the State of New York, Richmond County, of the crimes of Receiving Reward for Official Misconduct, a class E felony [New York Penal Law §200.25] and Official Misconduct, a class A misdemeanor [New York Penal

Law §195.00]. These convictions arose out of his actions in arranging for and permitting the clandestine dumping and burial of unauthorized liquid waste at the City's Brookfield landfill on Staten Island in exchange for monies paid by out-of-state industrial waste transporters.

The Grand Jury of Richmond County handed down, on February 16, 1982, a twelve-count indictment (No. 42/1982), charging petitioner with the crimes of Receiving Reward for Official Misconduct in the Second Degree [New York Penal Law §200.25], Giving Unlawful Gratuities [Penal Law §200.30] and Official Misconduct [Penal Law §195.00] (4 counts each).

Four months later, a superseding 24-count indictment (No. 42-S/1982) was filed against petitioner, charging him with numerous counts of Bribe Receiving in the Second Degree [New York Penal Law §200.10], Receiving Reward for Official Misconduct in the Second Degree [Penal Law §200.25], Receiving Unlawful Gratuities [Penal Law §200.35], Rewarding Official Misconduct in the Second Degree [Penal Law §200.20], Giving Unlawful Gratuities [Penal Law §200.30] and Obstructing Governmental Administration [Penal Law §195.05] (RA 12-24).* Counts 1, 2, 3, 13, 14, and 15 embraced the overall time period of September 1977-March 1979; the remaining counts of the indictment charged the commission of the same crimes but within narrower, consecutive time frames.

Following the disposition of petitioner's, pre-trial omnibus motions, the jury trial of Indictment No. 42-S/1982 began on October 25, 1982. Before jury selection began, petitioner's attorney asked for an adjournment of the trial until "some time" in 1983 on the ground

*Numbers preceded by "RA" refer to pages of Respondent's Appendix annexed hereto; numbers preceded by "T" refe to pages of the Trial Transcript, as originally numbered.

that the "consistent and systematic reporting [by the local newspaper of this case]" and the campaign literature distributed by Congressman Guy V. Molinari, who was then running for a second term, was serving to deprive his client of a fair trial. The defense application was denied by the court "at this time." (RA 31-32).

William L. Murphy, now the District Attorney of Richmond County but then the Chief Assistant District Attorney and the trial prosecutor, then moved to amend counts 15, 18, 21, and 24 of the indictment. Due to typographical error in preparing the superseding indictment, these counts had mistakenly charged petitioner with "Obstructing Governmental Administration" [Penal Law §195.05], rather than "Official Misconduct" [Penal Law §195.00] as charged by the corresponding counts in the original indictment. Petitioner's attorney expressly stated that he had no objection to the correction of this typographic error in the designation of the crime (RA 33).

In response to defense counsel's complaint that the People had not furnished him with more precise dates beyond those set forth in the indictment, Mr. Murphy explained that despite the People's persistent efforts, the prosecution was unable to be more specific. The People's case would be that petitioner committed the crimes charged over a period of time and not on any one specific date. This posture met with the trial court's approval, and petitioner's attorney made no objection (RA 33-35). Jury selection, which began that day, was completed on Wednesday, October 27, 1982.

Of the dozen witnesses who testified against petitioner, most were Sanitation Department colleagues and subordinates who described the midnight caravans of out-of-state trucks lined up to dump their illicit cargo and peti-

tioner's responsibility therefor; three of the truck drivers also testified, telling the jury that it was petitioner who would meet their tanker trucks and show the drivers where they could dump their loads. The prosecution's final witness was Edith Gittleman, the long-time bookkeeper from Northeast Oil/Newtown, who testified that the payments made to petitioner were written off by the company as "land fill expenses." The cost per load was originally $100, but it then "worked its way up" to $150/load.

On Monday, November 8, 1982, the defense motion for a trial order of dismissal was granted with respect to counts 1, 4, 7, 10, 11 and 12 of the indictment because the court found the People's evidence insufficient to sustain these charges.

Petitioner's case consisted of a host of witnesses, who were called primarily to attest to petitioner's character and reputation. Many of them were Sanitation Department employees who claimed it was not unusual to see private carting trucks with out-of-state license plates at the landfill and that the dumping of oil was "standard practice" in order to damp down the landfill roads. Even so, several of petitioner's own witnesses verified the testimony of the prosecution witnesses that liquid wastes were never allowed up on the landfill banks and that the practice of spreading oil on the roads was never done at night—and halted altogether in 1979.

Petitioner further stipulated that he was a public servant within the purview of New York's Penal Law, and both the prosecution and the defense agreed that only counts 2, 3, 13, 14, and 15 of the indictment (which charged the commission of the crimes during the overall time period) should be submitted to the jurors in order to

simplify matters for them. The remaining counts of the indictment (referring to the narrower consecutive time periods) were withdrawn, pursuant to section 300.40(6)(a) of the Criminal Procedure Law (T 653, 734-736).

After one and a half days of deliberation, including readbacks of trial testimony, the jury returned a verdict on November 11, 1982, convicting petitioner of renumbered counts 1 and 5 (Receiving Reward for Official Misconduct in the Second Degree and Official Misconduct) but acquitting him of renumbered counts 2, 3, and 4 (Receiving Unlawful Gratuities, Rewarding Official Misconduct in the Second Degree, and Giving Unlawful Gratuities).

At sentencing, petitioner himself and his attorney repeatedly expressed their satisfaction with the treatment accorded them by the court and Mr. Murphy, although they asserted that the jurors' verdict was merely a reflection of the Staten Island citizenry's desire to have a scapegoat or target for their concerns with toxic waste dumping. The trial court declined to sentence petitioner to merely a term of probation, pointing out that the crimes were of an on-going nature, not just an isolated incident, and that petitioner had betrayed the public trust entrusted to him. Although petitioner was sentenced to an indeterminate, one to three year prison term and a $5,000 fine, he was permitted to remain at liberty on $5,000 bail pending appeal.

By order and opinion dated July 12, 1984, petitioner's convictions were unanimously affirmed by a four-judge panel of the Supreme Court of the State of New York, Appellate Division, Second Department. On August 6, 1984, Hon. Lawrence H. Cooke, Chief Judge of the New York Court of Appeals, the State's highest court, denied petitioner's application for leave to appeal to that court from the Appellate Division's order of affirmance.

Petitioner was finally committed to the custody of the New York State Department of Corrections on September 21, 1984, after the United States District Court, Eastern District of New York (McLaughlin, J.), refused petitioner's application for an order enjoining the Richmond County Supreme Court from executing the sentence imposed almost two years before.

REASONS FOR DENYING THE WRIT

1. The questions posed by the instant petition for certiorari are either beyond this Court's jurisdiction or do not merit its review.

A. Petitioner has failed to meet the jurisdictional prerequisite of 28 U.S.C. §1257.

As underscored by his failure to comply with Rule 23(1)(f) of this Court, petitioner simply did not invoke the Federal Constitution before the state trial court or even on appeal to the New York appellate courts.

Before jury selection began, petitioner's attorney asked the trial judge to direct the People to furnish "in the nature of a bill of particulars, the time and/or the dates of the allegation contained in the indictment." Counsel noted that his previous request for such a bill of particulars had been denied but, he submitted,

> under the case of People versus Iannone, it is a Court of Appeals case, your Honor, the numerical citation I don't have, that the defendant is at a loss to properly defend himself, when he is unable to ascertain the dates when he is alleged to have committed these crimes.
>
> I would ask again, at this time, that the People furnish me with the approximate dates so that the defendant

> Cassiliano might properly defend himself in this Courtroom, and without those dates the defendant is at a loss and cannot properly defend himself.

Thus, the record establishes that petitioner viewed this issue as simply a matter of state law, as evidenced by his lone reference to the New York Court of Appeals' decision in *People v. Iannone* [45 N.Y.2d 589]. While petitioner represented that "without these dates, (he) is at a loss and cannot properly defend himself," such vague and fleeting reference should not be deemed an adequate basis on which to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1257.

That portion of petitioner's appeal to the Appellate Division, Second Department, addressed to the accusatory instrument, was staked on his assertion that the prosecutor failed to serve a court-ordered bill of particulars. Consequently, he argued, he was denied the right to be informed of the charges against him, and by operation of section 200.95(6) of New York's Criminal Procedure Law, the trial should have been stayed pending filing and service of such a bill of particulars. In his reply brief of December 22, 1983, petitioner continued to rely on his interpretation of the Criminal Procedure Law and was content to cite only New York cases for his claim that "a bill of particulars stating the dates on which the alleged offenses were committed should have been provided to give the defendant an adequate opportunity to prepare a defense. *People v. Morris, supra,* 94 A.D.2d 959; *People v. Villani, supra,* 59 N.Y.2d 781." Appellant's Reply Brief, p. 9.

Finally, petitioner's application for leave to appeal to the New York Court of Appeals is equally devoid of any reference to any Federal Constitutional provision whatsoever.

As petitioner did not articulate his Federal Constitutional challenge to the specificity of the indictment and any grounds therefor with any clear distinction before any of the New York courts in which he appeared, it cannot be said that he properly raised a substantial Federal question in the course of the state court proceedings. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67-68 (1928); *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655 (1897) ("the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right").

Similarly, petitioner raised no claim of Federal Constitutional protection in applying for a continuance of the trial on the ground of unduly prejudicial publicity. While he did cite *Sheppard v. Maxwell,* 384 U.S. 333 (1966), and *Irvin v. Dowd,* 366 U.S. 717 (1961), in his briefs to the intermediate state appellate court, he did not even advance this issue as a reason for granting his application for leave to appeal to the New York Court of Appeals. Having abandoned this challenge before the state's highest court, he should not now be heard by this Court.

B. The record flatly contradicts petitioner's allegation that the trial court ordered the prosecutor to serve and file a bill of particulars with precise dates. In any event, the questions as to whether the state courts correctly interpreted Articles 200 and 240 of New York's Criminal Procedure Law and the New York Court of Appeals' decision in *People v. Morris* are ones of state—not Federal Constitutional—law.

As he has done throughout the course of his appeal in the state courts and in his petition to the local Federal court for a writ of habeas corpus, petitioner persists in his allegation that the trial court granted his pretrial application for a bill of particulars setting forth specific dates of his alleged criminal conduct (Petition, pp. 4, 12-13). This misrepresentation is clearly refuted by the record of the trial court.

In response to that part of petitioner's motion for a bill of particulars addressed to the original indictment (No. 42/1982), the then Chief Assistant District Attorney Murphy pointed out that the counts were grouped by specific time periods set forth in each count of the indictment. He further swore that "(t)he dates set forth in the indictment are as precise as can be given" (RA 6). Contrary to petitioner's allegation, the order of Justice Owens dated May 5, 1982, granted petitioner's request for a bill of particulars as to specific dates "on consent," *i.e.*, to the extent disclosed by the prosecutor's responding affirmation (RA 10). Thus, the People did not disobey, as petitioner would have this Court believe, the trial court's order disposing of his omnibus motion. Indeed, petitioner's attorney himself later noted that his request had been denied by Justice Owens (RA 34).

Similarly, in answer to petitioner's second written request, the prosecutor averred that "dates certain" could not be provided (RA 29). And again, when defense counsel requested "the time and/or dates of the allegations contained in the indictment," the prosecutor advised both the defense and the trial court that the People were unable to be any more specific than those dates set forth in the indictment. Moreover, the People intended to prove only that the crimes charged took place during the specified periods of time, not on any one date. The trial

court expressed its agreement, noting that "If he (Mr. Murphy) doesn't have them, he doesn't have them." (RA 33-35). Petitioner did not object to going forward; indeed, he promptly announced his readiness to proceed (RA 36). In sum, petitioner's claim that the prosecutor failed to comply with an order of the trial court directing him to furnish specific dates is a gross distortion of the record below and should be disregarded.

More importantly, petitioner's efforts to convince this Court that the state courts below erred in their construction of Articles 200 and 240 of New York's Criminal Procedure Law and in their refusal to invalidate his convictions under an application of *People v. Morris,* 61 N.Y.2d 290 (1984), should prove singularly unavailing. Even assuming *arguendo* that the New York courts had misapplied New York law, such an error of state law is not a denial of Federal due process and surely does not constitute a wrong of Federal Constitutional dimension cognizable by this Court. *See, Engle v. Isaac,* 456 U.S. 107, n. 21 (1982); *Smith v. Phillips,* 455 U.S. 209 (1982).

C. Petitioner's claim that the indictment was Constitutionally defective turns on its own facts and therefore is not sufficiently important as to warrant granting the writ of certiorari; moreover, petitioner was adequately apprised of the charges against him.

Resolution of petitioner's challenge to the length of the time periods encompassed by Indictment No. 42-S/1982 would necessarily turn on the particular facts of this case and would scarcely offer this Court the opportunity to afford broad guidance to the courts of this nation. For this reason alone, a writ of certiorari should not issue. Furthermore, the instant indictment did not offend the Constitution as it provided petitioner with adequate

notice of the case against him.

The Federal courts have held that great generality in a federal indictment's allegation of dates is permissible, so long as the prosecution is commenced within the applicable statute of limitations. 1 Wright, *Federal Practice and Procedure: Criminal,* §125 at 246-247. Thus, an indictment which charged that the crime began as early as 1961 and continued through the end of November 1974, "the exact date of beginning being unknown to the grand jurors," was held sufficiently specific to apprise the defendants of the charges against them so that they could prepare an adequate defense and also avoid the possibility of the defendants being placed in double jeopardy. *United States v. Tedesco,* 441 F.Supp. 1336 (M.D. Pa. 1977). So too the indictment in *United States v. Garrett,* 680 F.2d 650 (9th Cir. 1982), which charged the time of the offense as "during 1975," was deemed sufficiently definite to apprise the defendants of the charges against them. And, the validity of an indictment whose specificity of dates was simply "on or about 1977, the exact dates to the grand jury unknown" has also been upheld. *United States v. Nunez,* 668 F.2d 10 (1st Cir. 1981). In ruling that the lack of specificity was not prejudicial to the defense, the *Nunez* court pointed out that the defendants essentially knew before trial as much about the evidence concerning the dates as did the prosecution. Such was the case here. Indeed, petitioner himself makes much of the fact that the prosecution witnesses could not testify to specific calendar dates (Petition, pp. 6-10, 18-19). Thus, the element of surprise, which the Sixth Amendment was designed to guard against, was conspicuous by its absence from the trial proceedings in the matter at bar. If the indictments in the foregoing cases were upheld by the federal courts, which have general supervisory powers over the federal criminal justice system but not over the State courts, then there is

certainly no basis for issuing a writ of certiorari with an eye towards setting aside the instant conviction and indictment on the more extraordinary ground of federal constitutional deficiency.

Petitioner suggests that had he been given specific dates on which he committed the crimes in question he could have established an alibi defense "that his signatures in the Brookfield time book showed that he was not present in Brookfield on the dates alleged by the indictment, or by accusing witnesses" (Petition, p. 5). Such claim should be given short shrift by this Court. Petitioner advanced no such intent before the trial court to avail himself of an alibi defense. (Such defense surely would not have been compelling in this case where there was no question of petitioner's identity, given the fact that the prosecuting witnesses had known him for years). And the record belies this allegation, as evidenced by his inability to provide a citation thereto. Indeed, Michael Quagliano, one of petitioner's own witnesses, testified that while petitioner would sign in at Fresh Kills Plant Number One, his reporting location, he would not sign in at the other locations under his supervision, which included Brookfield (T538-539). In any event, there is obviously no constitutional right to a complete defense which will exonerate oneself of all criminal charges, for then any person convicted of a crime would be entitled to vacatur of his conviction on the ground that his Sixth Amendment right had been infringed, a result surely not envisioned by the drafters of the Constitution or sanctioned by this Court. Rather, the rule is that "the accused shall be definitely informed as to the charges against him so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial and that he may be protected against another prosecution for the same offense. . . ." *Berger v. United States,* 235 U.S. 78, 82

(1935) [citations omitted]. As discussed above, petitioner was not taken by surprise by the evidence as to dates offered at the trial herein. That he did not view himself as unduly handicapped by the lack of greater specificity *vis à vis* the dates set forth in the multiple counts of the indictment is evidenced by his failure to move, before trial, to dismiss the indictment or this ground. Nor did he voice any objection to proceeding to trial, after Mr. Murphy once again explained that, despite the prosecution's efforts, more specific dates could not be supplied; indeed, petitioner's counsel promptly announced his readiness to proceed with *voir dire* (RA 33-36). Finally, it should be noted that petitioner was acquitted of three of the five counts submitted to the jury.

Petitioner's claim that he was denied his Sixth Amendment rights is patently devoid of substance; it surely does not merit this Court's full review.

D. Petitioner's claim that he was denied "his constitutional right to due process of law" by media coverage of his trial is not supported by the record.

Petitioner asserts that there was virtually an unending stream of damning newspaper, radio and television publicity attendant to these criminal proceedings and that he consequently was deprived of his "constitutional right to due process of law" (Petition, pp. 21-22). He further argues that the trial judge should have adjourned the trial until after the publicity had abated, transferred the case to another county, or ordered a new trial (Petition, pp. 21, 24). The record of the trial court proceedings, however, cannot support petitioner's claim.

On the eve of trial and before *voir dire* of the potential jurors began, defense counsel sought to postpone the

trial until "some time" after the New Year, on the ground that petitioner could not obtain a fair trial, due primarily to the local newspaper articles concerning this particular defendant and toxic waste in general (RA 31-32). The trial court denied the application "at this time" (RA 32). Petitioner did not renew this application for a continuance following jury selection, nor did he ever seek a change of venue.

Petitioner did move for a mistrial following the mid-trial publication of two newspaper articles (T240-241). The trial court immediately examined each of the jurors who, in turn, assured the judge that they had not read either one. Petitioner's counsel expressed his satisfaction with this procedure, adding "The only thing I would ask Your Honor to do [is] ask the jury to continue to follow your admonition not to look at any newspapers" (T 243-244). The court promptly and scrupulously instructed the jurors, as it repeatedly had before, that they were to avoid any discussion of the case before them and to refrain from reading any newspaper articles or listening to other media reports (T 244). This admonition was reiterated throughout the trial.

In sum, the paucity of petitioner's claim of undue, prejudicial publicity is demonstrated by his failure to seek, during or after jury voir dire, an adjournment or transfer of the trial and by his express satisfaction with the trial court's procedures in this regard. Finally, it should be pointed out that the newspaper articles which petitioner now claims were so egregious were never admitted into evidence or proffered as court exhibits, and there is absolutely no contemporary reference in the trial record, of even a fleeting nature, to the radio and television newscasts which petitioner alleges "[saturated] the minds of the people in Staten Island" (Petition, p. 22). Since the

record lacks any factual basis on which this Court might undertake an informed evaluation, this issue is surely beyond the Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: Staten Island, New York
January 3, 1985

Respectfully submitted,

KAREN FISHER MCGEE
Assistant District Attorney,
Richmond County
Attorney for Respondent
District Attorney's Office
36 Richmond Terrace
Staten Island, N.Y. 10301
(718) 390-2667

PETITIONER'S NOTICE OF MOTION FOR OMNIBUS RELIEF, DATED APRIL 21, 1982

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND : CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN CASSILIANO,

Defendant.

INDICTMENT NO. 42/1981
NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that upon the annexed Affirmation of ANTHONY V. LOMBARDINO, Affirmed the 21st day of April, 1982, the indictment filed herein and upon all prior proceedings heretofore had herein, the undersigned will move this Court at a Criminal Term to be held in and for the County of Richmond at the Supreme Court, St. George, Staten Island, New York, on the 3rd day of May, 1982 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an Order granting the relief requested, as follows:

1. Dismissal of each and every count of the indictment as they are defective within the meaning of Sections 210.25(1), (2) and 200.50(7) of the Criminal Procedure Law, in that they do not assert facts with sufficient fullness and clarity to enable the defendant to adequately prepare for trial.

2. Transcription and inspection of the Grand Jury Minutes upon which the indictment against the defendant is predicated and dismissal of said indictment pursuant to Sections 210.20, 210.30, 210.40 and 210.45 of the CPL and the Fourteenth Amendment of the United States Constitution:

or in the alternative, for a Hearing on same, pursuant to Section 210.45(6) of the C.P.L.,

Or, in the alternative, inspection of the Grand Jury Minutes by Counsel for defendant leave to file further Motions based upon said inspection.

3. For a Bill of Particulars, setting forth:

a. The time, place and date it is alleged that the defendant committed the crimes charged in each and every count of the indictment.

b. The substance of the defendant's acts with which constitutes his alleged participation in crimes charged in each and every count of the indictment.

4. Discovery and inspection pursuant to Section 240 of the C.P.L. by counsel of the following material and information within the possession and/or control of the District Attorney.

5. Discovery and inspection of copies of each and every work order, invoice, documents, transcripts, etc., that is the subject of each count of the indictment.

6. For a pretrial hearing to suppress introduction of evidence of pretrial identification procedures and suppression of court identification of the defendant.

7. For suppression of physical evidence seized from the defendant in violation of his rights pursuant to the Fourth, and Fourteenth Amendments of the United States Constitution, and Section 710.20(1) of the C.P.L.,

or, in the alternative, the holding a pre-trial hearing to determine same.

8. For suppression of statements allegedly made by the defendant in violation of his rights pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, and Section 710.20(3) of the C.P.L., or, in the alternative, a pretrial hearing to determine the voluntariness of said alleged statements.

9. For the right to further move this Court on the basis of information gleaned as a result of the items requested herein.

10. For a full hearing to suppress all evidence resulting from electronic surveillance, on grounds that the facts recited in the affidavits in support of the order for electronic surveillance spell out the misdemeanor of receiving unlawful gratuities, which is not a crime for which electronic surveillance is authorized pursuant to Section 700.05 of the Criminal Procedure Law and 18 U.S.C. 2516(2).

11. And for such other and further relief as to this Court may deam just and proper.

DATED: KEW GARDENS, NEW YORK
April 21st, 1982.

YOURS, ETC.,

ANTHONY V. LOMBARDINO
ATTORNEY FOR DEFENDANT
125-10 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415
(212) 275-0200

TO:
HON. THOMAS R. SULLIVAN
DISTRICT ATTORNEY
RICHMOND COUNTY
36 RICHMOND TERRACE
STATEN ISLAND, NEW YORK 10301

AFFIRMATION OF WILLIAM L. MURPHY IN OPPOSITION TO MOTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND : CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN CASSILIANO,

Defendant.

AFFIRMATION
IND. NO. 42/1982
(82-0057)

WILLIAM L. MURPHY, ESQ., an attorney duly admitted to practice law in the State of New York, affirms that the following statement is true under penalty of perjury.

That he is an Assistant District Attorney in and for the County of Richmond and that the sources of his information and the basis of his beliefs are the files and records of the Office of the District Attorney of Richmond County.

That this affirmation is submitted in opposition to the defendant's omnibus motion dated April 21, 1982. This motion is divided into various branches and contains numerous numbered paragraphs. This affirmation will treat each of the branches separately and make refernece to the paragraphs as numbered in the defendant's motion.

AS TO THE MOTION TO DISMISS THE INDICTMENT

Each count of the Indictment pleads the statutory language set forth in P.L. §§220.20; 200.30; 195.00 and hence is sufficient in form.

The People deny the assertion, which is obviously boiler plate that the instant indictment is not tailor made for the instant case. In fact, it is and is neither boiler plate nor computer print out.

AS TO THE MOTION FOR A BILL OF PARTICULARS

Each count covers the period during which the crimes were committed. There is a linkage of an overall period (September 1, 1977 to March 31, 1979) in the first three counts. There are calendar year linkages in counts 4 through 6 (1977); 7 through 9 (1978) and 10 through 12 (1979).

The events in question took place on or near the Brookfield Truckfill.

The dates set forth in the indictment are as precise as can be given.

The acts which constitute each of the crimes consist of the defendant's paying off a subordinate for the subordinate's assistance in dumping illegal, unauthorized liquid wastes in the Brookfield Truckfill.

The People consent to the inspection of the material referred to in paragraph numbered 5 by the defense and/or its experts at a time and place to be mutually

agreed upon, provided there will be no alteration of the physical evidence.

There was no out of court identification procedure in this case, hence the hearing as requested in paragraph numbered 6, is not warranted.

No physical evidence seized from the defendant will be offered by the People as part of their case in chief, hence the hearing as requested in paragraph numbered 7, is not warranted.

AS TO THE MOTION TO INSPECT GRAND JURY MINUTES

In reply to paragraph numbered 2, the People consent to an *in camera* inspection of the Grand Jury Minutes by the Court.

In reply to paragraph numbered 2, the attention of the Court is respectfully directed to the principle of law that the facts elicited before the Grand Jury are to be viewed in a light most favorable to the People and that there is therefor a prima facie case that a crime has been committed. The defendant has totally failed to sustain his burden of clearly showing that the evidence presented before the Grand Jury, if unexplained or uncontroverted, would not warrant a conviction.

In reply to paragraph numbered 2, the People assert their statutory right to present arguments *in camera* against the release of Grand Jury testimony to the defendant on the grounds that the release of such testimony would be against the public interest.

AS TO THE MOTION TO DISMISS THE INDICTMENT BECAUSE OF ALLEGED DEFECTS IN THE PROCEEDINGS.

In paragraph numbered 2, the defendant has simply alleged conclusions, but no facts in support of this motion, hence it must be denied.

In reply to paragraph numbered 2, the People consent to an *in camera* inspection by the Court of the instructions given to the Grand Jury.

In reply to paragraph numbered 2, the attention of the Court is respectfully directed to the principle of law that instructions to the Grand Jury need not include all matters that would be charged to a petit jury, but are sufficient if they meet the less exacting requirement of permitting the Grand Jury to determine if there is a prima facie case.

AS TO THE MOTION FOR A "HUNTLEY" HEARING

No statement of the defendant will be offered as part of the People's case in chief, hence no hearing is warranted.

There was no electronic surveillance in this case.

WHEREFORE, it is respectfully submitted, that except as set forth herein in this affirmation the defendant's omnibus motion should be in all respects denied.

Dated: April 30, 1982
Staten Island, N.Y.

s/ William L. Murphy
WILLIAM L. MURPHY,
Assistant District Attorney

ORDER OF MAY 5, 1982 DECIDING PETITIONER'S MOTION

Supreme Court, Criminal Term, Richmond County

PEOPLE OF THE STATE OF NEW YORK

vs.

John Cassiliano

By Owens, J. J.S.C.
Dated May 5, 1982
Indictment No. 42/82

After reading the defendant's Omnibus Motion and the prosecution's affirmation in opposition, the court makes the following findings:

1. The motion for inspection of the grand jury minutes is granted but the motion to dismiss the indictment for defectiveness is denied.

In respect for the Demand for a Bill of Particulars:

3a. Granted on consent.

b. Same as 3a.

4. Withdrawn

5. Granted on consent.

6. Denied since there was no pre-trial identification procedure.

7. Denied.

8. Denied.

9. Granted.

10. Withdrawn.

This is the Order of the Court.

s/ T.E.O.
T.E.O.

FILED 5-5-82
SUPREME COURT-CRIMINAL TERM
RICHMOND COUNTY
AJV CLERK

SUPERSEDING INDICTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND : CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JOHN CASSILIANO,

Defendant

INDICTMENT NO.: 425/1982
FILED: 6/21/82
(82-0057)

THE GRAND JURY OF THE COUNTY OF RICHMOND, by this Indictment, accuses the defendant of the crime of BRIBE RECEIVING IN THE SECOND DEGREE (P.L. §200.10), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about September 1, 1977 to on or about March 31, 1979, as part of a common scheme and plan, did solicit, accept and agree to accept a benefit from employees of New Town Refining Company and its successor, Hudson Oil Company upon an agreement and understanding that his judgment, action, decision and exercise of discretion as a public servant would thereby be influenced in that the defendant in exchange for said payment of money, arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNT TWO

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of RECEIVING REWARD FOR OFFICIAL MISCONDUCT IN THE SECOND DEGREE (P.L. §200.25) committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about September 1, 1977 to on or about March 31, 1979 as a part of a common scheme and plan solicited, agreed to accept and accepted a benefit, namely a sum of money, from employees of New Town Refining Company and its successor company Hudson Oil for violating his duty as a public servant in that the defendant in exchange for said money arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNT THREE

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of RECEIVING UNLAWFUL GRATUITIES (P.L. §200.35), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about September 1, 1977 to on or about March 31, 1979, as part of a common scheme and plan, solicited, agreed to accept and accepted a benefit, namely a sum of money for engaging in official conduct, namely supervising truckfill operations at the Brookfield Truckfill and for which he was not entitled to any special or additional compensation.

COUNT FOUR

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of BRIBE RECEIVING IN THE SECOND DEGREE (P.L. §200.10), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about September 1, 1977 to December 31, 1977, solicited, agreed to accept and accepted a benefit, namely a sum of money from employees of New Town Refining Company upon an agreement or understanding that his judgment, action, decision or exercise of discretion as a public servant would thereby be influenced, in that the defendant in exchange for said payment of money arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNT FIVE

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of RECEIVING REWARD FOR OFFICIAL MISCONDUCT IN THE SECOND DEGREE (P.L. §200.25) committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about September 1, 1977 to on or about December 31, 1977, solicited, agreed to accept and accepted a benefit, namely a sum of money, from employees of New Town Refining Company for violating his duty as a public servant in that the defendant in exchange for said money arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNT SIX

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of RECEIVING UNLAWFUL GRATUITIES (P.L. §200.35), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about September 1, 1977 to on or about December 31, 1977, solicited, agreed to accept and accepted a benefit, namely a sum of money for engaging in official conduct, namely supervising truckfill operations at the Brookfield Truckfill and for which he was not entitled to any special or additional compensation.

COUNT SEVEN

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of BRIBE RECEIVING IN THE SECOND DEGREE (P.L. §200.10), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about January 1, 1978 to on or about December 31, 1978, solicited, agreed to accept and accepted a benefit, namely a sum of money from employees of New Town Refining Company upon an agreement or understanding that his judgment, action, decision or exercise of discretion as a public servant would thereby be influenced, in that the defendant in exchange for said payment of money arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNT EIGHT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of RECEIVING REWARD FOR OFFICIAL MISCONDUCT IN THE SECOND DEGREE (P.L. §200.25) committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about January 1, 1978 to on or about December 31, 1978, solicited, agreed to accept and accepted a benefit, namely a sum of money, from employees of New Town Refining Company for violating his duty as a public servant in that the defendant in exchange for said money arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNT NINE

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of RECEIVING UNLAWFUL GRATUITIES (P.L. §200.35), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about January 1, 1978 to on or about December 31, 1978, solicited, agreed to accept and accepted a benefit, namely a sum of money for engaging in official conduct, namely supervising truckfill operations at the Brookfield Truckfill and for which he was not entitled to any special or additional compensation.

COUNT TEN

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of BRIBE RECEIVING IN THE SECOND DEGREE (P.L. §200.10), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about January 1, 1979 to on or about December 31, 1979, solicited, agreed to accept and accepted a benefit, namely a sum of money from employees of New Town Refining Company upon an agreement or understanding that his judgment, action, decision or exercise of discretion as a public servant would thereby be influenced, in that the defendant in exchange for said payment of money arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNT ELEVEN

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of RECEIVING REWARD FOR OFFICIAL MISCONDUCT IN THE SECOND DEGREE (P.L. §200.25) committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about January 1, 1979 to on or about December 31, 1979, solicited, agreed to accept and accepted a benefit, namely a sum of money, from employees of New Town Refining Company for violating his duty as a public servant in that the defendant in exchange for said money arranged for and permitted the dumping and burying of unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNT TWELVE

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of RECEIVING UNLAWFUL GRATUITIES (P.L. §200.35), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about January 1, 1979 to on or about December 31, 1979, solicited, agreed to accept and accepted a benefit, namely a sum of money for engaging in official conduct, namely supervising truckfill operations at the Brookfield Truckfill and for which he was not entitled to any special or additional compensation.

COUNT THIRTEEN

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of REWARDING OFFICIAL MISCONDUCT IN THE SECOND DEGREE (P.L. §200.20). committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about September 1, 1977 to on or about March 31, 1979, as part of a common scheme and plan, did knowingly confer, offer and agree to offer a benefit, namely money, supon ANTHONY SOCCI, a public servant, on divers occasions for having violation his duty as a sanitationman by preparing a site for dumping and then burying unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNT FOURTEEN

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of

GIVING UNLAWFUL GRATUITIES (P.L. §200.30), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about September 1, 1977 to on or about March 31, 1979, as part of a common scheme and plan, did knowingly confer, offer and agree to confer a benefit upon ANTHONY SOCCI, a public servant, for having engaged in official conduct which he was required and authorized to perform as a sanitation man and for which he was not entitled to any special and additional compensation.

COUNT FIFTEEN

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of OBSTRUCTING GOVERNMENTAL ADMINISTRATION (P.L. §195.05), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about September 1, 1977 to on or about March 31, 1979, as part of a common scheme and plan, being a public servant, and with intent to obtain a benefit, on divers occasions committed an act relating to his office, namely directing a subordinate to dig a hole and bury unrecorded and unauthorized liquid waste material but which constituted an unauthorized exercise of his official functions and the defendant knew that such act was unauthorized.

COUNT SIXTEEN

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of REWARDING OFFICIAL MISCONDUCT IN THE SECOND DEGREE (P.L. §200.20), committed as follows:

The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period from on or about September 1, 1977 to on or about December 31, 1977, did knowingly confer, offer and agree to confer a benefit upon ANTHONY SOCCI, a public servant, on divers occasions, for having violated his duty as a sanitation man by preparing a site for dumping and then burying unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNT SEVENTEEN

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of GIVING UNLAWFUL GRATUITIES (P.L. §200.30), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about September 1, 1977 to on or about December 31, 1977, did knowingly confer, offer and agree to confer a benefit upon ANTHONY SOCCI, a public servant, for having engaged in official conduct which he was required and authorized to perform and for which he was not entitled to any special and additional compensation.

COUNT EIGHTEEN

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of OBSTRUCTING GOVERNMENTAL ADMINISTRATION (P.L. §195.05), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about September 1, 1977 to on or about March 31, 1977, being a public servant, and with intent to obtain a benefit, on divers occasions committed an act

relating to his office, namely directing a subordinate to dig a hole and bury unrecorded and unauthorized liquid waste material but which constituted an unauthorized exercise of his official functions and the defendant knew that such act was unauthorized.

COUNT NINETEEN

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of REWARDING OFFICIAL MISCONDUCT IN THE SECOND DEGREE (P.L. §200.20), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period from on or about January 1, 1978 to on or about December 31, 1978, did knowingly confer, offer and agree to confer a benefit upon ANTHONY SOCCI, a public servant, on divers occasions, for having violated his duty as a sanitation man by preparing a site for dumping and then burying unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNT TWENTY

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of GIVING UNLAWFUL GRATUITIES (P.L. §200.30), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about January 1, 1978 to on or about December 31, 1978, did knowingly confer, offer and agree to confer a benefit upon ANTHONY SOCCI, a public servant, for having engaged in official conduct which he was required and authorized to perform and for which he was not entitled to any special and additional compensation.

COUNTY TWENTY-ONE

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of OBSTRUCTING GOVERNMENTAL ADMINISTRATION (P.L. §195.05), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about January 1, 1978 to on or about December 31, 1978, being a public servant, and with intent to obtain a benefit, on divers occasions committed an act relating to his office, namely directing a subordinate to dig a hole and bury unrecorded and unauthorized liquid waste material but which constituted an unauthorized exercise of his official functions and the defendant knew that such act was unauthorized.

COUNT TWENTY-TWO

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of REWARDING OFFICIAL MISCONDUCT IN THE SECOND DEGREE (P.L. §200.20), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period from on or about January 1, 1979 to on or about March 31, 1979, did knowingly confer, offer and agree to confer a benefit upon ANTHONY SOCCI, a public servant, on divers occasions, for having violated his duty as a sanitation man by preparing a site for dumping and then burying unrecorded and unauthorized liquid waste material at the Brookfield Truckfill.

COUNTY TWENTY-THREE

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of GIVING UNLAWFUL GRATUITIES (P.L. §200.30), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about January 1, 1979 to on or about March 31, 1979, did knowingly confer, offer and agree to confer a benefit upon ANTHONY SOCCI, a public servant, for having engaged in official conduct which he was required and authorized to perform and for which he was not entitled to any special and additional compensation.

COUNT TWENTY-FOUR

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses the said defendant of the crime of OBSTRUCTING GOVERNMENTAL ADMINISTRATION (P.L. §195.05), committed as follows: The said defendant, in the Borough of Staten Island, County of Richmond, City and State of New York, during the period of from on or about January 1, 1979 to on or about March 31, 1978 being a public servant, and with intent to obtain a benefit, on divers occasions committed an act relating to his office, namely directing a subordinate to dig a hole and bury unrecorded and unauthorized liquid waste material but which constituted an unauthorized exercise of his official functions and the defendant knew that such act was unauthorized.

s/ Thomas R. Sullivan
District Attorney

A TRUE BILL
s/ Joseph Tuminalli
Foreman

PETITIONER'S OMNIBUS MOTION TO DISMISS SUPERSEDING INDICTMENT AND FOR BILL OF PARTICULARS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND : CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN CASSILIANO,

Defendant.

INDICTMENT No. 42-S/1982
NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE that upon the annexed Affirmation of ANTHONY V. LOMBARDINO, affirmed the 27th day of August, 1982, the Superseding Indictment, and all the proceedings heretofore had herein, Defendant will move this Court at a Criminal Term Part to be held in and for the County of Richmond on the 22 day of September, 1982 at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an Order:

1. To dismiss each and every count of the Indictment charging Bribe Receiving in the Second Degree, Receiving Reward for Official Misconduct in the Second and Rewarding Official Misconduct in the Second Degree, on grounds that the Indictment does not set forth facts constituting said crimes.

2. To inspect the Grand Jury Minutes and dismiss the counts charging Bribe Receiving in the Second Degree, Receiving Reward for Official Misconduct in the Second Degree and Rewarding Official Misconduct in the Second Degree on grounds that the evidence was insufficient to support these charges.

3. For a Bill of Particulars setting forth the date, time and place of each crime charged in the Indictment; setting forth the sum of money paid on each occasion, the name of the person who made such payments; the service allegedly to be performed by the defendant in connection therewith and the Rule and Regulation and content thereof alleged to be violated by the performance of said services; and for such other and further relief as to this Court may deem just and proper.

DATED: KEW GARDENS, NEW YORK
AUGUST 26th, 1982.

YOURS, ETC.,

ANTHONY V. LOMBARDINO
ATTORNEY FOR DEFENDANT
OFFICE & P.O. ADDRESS
125-10 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415
(212) 275-0200

TO:
HON. THOMAS R. SULLIVAN
DISTRICT ATTORNEY, RICHMOND COUNTY
36 RICHMOND TERRACE
STATEN ISLAND, NEW YORK 10301

AFFIRMATION OF WILLIAM L. MURPHY IN OPPOSITION TO MOTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND : CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JOHN CASSILIANO,

Defendant.

INDICTMENT 42-S/1982
(82-0057)

AFFIRMATION IN OPPOSITION

WILLIAM L. MURPHY, an attorney duly admitted to practice law before the Courts of the State of New York, does hereby affirm the following to be true under the penalties of perjury.

That he is Chief Assistant District Attorney, Richmond County, State of New York, and as such is familiar with the pleadings and proceedings heretofore had herein.

That this affirmation is submitted upon personal knowledge and upon information and belief, the source of such information and belief being the records of the District Attorney's Office.

The People concede defendant's entitlement to challenge the new counts in the superseding indictment. We ask the court to rule on the challenge.

The People concede that the defendant's allegations as to the factual basis of the original and superseding in-

dictments are substantially accurate.

The People agree that there are three (3) categories of felony charged in the superseding indictment and that felonies are more serious charges than misdemeanors.

The People disagree, however, with the defense contentions that the distinction between the felonies and misdemeanors charged herein involves the necessity for the People's proving that there was an intention to commit certain acts in violation of law.

The gist of the new felonies charged in the superseding indictment is that the defendant, in exchange for monies, violated his duty as a public servant.

In this case, the defendant's actions were intended to effect the improper and unauthorized disposal of liquid waste materials. The payments he received were illegal and the acts they generated were unauthorized. Each was a violation of the defendant's duties as a public servant.

Although satisfying each and every characterization set forth, the defendant's action need only satisfy the "violation of duties" criterion to support an indictment. They do.

Indictments are designed and destined to inform defendants about why they stand before the bar of justice. The defendant has told this court he knows why he's here. The indictment has obviously served its purpose.

His request for information as to what he was required to do is an interesting posture. He stands before the court stating his position as a Supervisor but asks "What was I supposed to do?" The answer is simple, he was sup-

posed to be a salaried Supervisory employee of the Department of Sanitation. He took other monies to do things he should not have done (allow trucks to deposit wastes improperly) and he gave monies to others to have them do what they should not do.

If the defendant really needs further clarification of what he did wrong; it may be stated as follows: he accepted monies to allow improper dumping to occur. That act violates the letter and spirit of the law as charged in the indictment. The impropriety of certain liquid waste dumping can be proven. It will be. It need not be pleaded—Why would someone get extra money for authorized dumping?

For all of the above reasons, the People oppose the motion to dismiss the felonies charged in the indictment.

The People have provided the defense with certain particulars requested in the instant motion. Dates certain and specific payment amounts cannot be provided. The acts alleged constitute the defendant's receiving payments from waste transporters to improperly dispose of liquid waste material at Brookfield Landfill ("services").

WHEREFORE, the People respectfully pray that the defendant's motion be, in all respects denied, except as to the information provided herein.

s/ William L. Murphy
WILLIAM L. MURPHY
Chief Assistant District Attorney

Dated: September 21, 1982
Staten Island, New York

PRETRIAL PROCEEDINGS OF OCTOBER 25, 1982

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND—CRIMINAL TERM
PART II

THE PEOPLE OF THE STATE OF NEW YORK

vs.

JOHN CASSILIANO,

Defendant.

Ind. No. 42-S/82
TRIAL

County Courthouse,
Staten Island, N.Y. 10301

October 25, 1983

BEFORE: HON. LOUIS SANGIORGIO, Justice.

APPEARANCES:

HON. THOMAS R. SULLIVAN, District Attorney
Appearing for the People

BY: WILLIAM MURPHY, ESQ.
Chief Assistant District Attorney

ANTHONY LOMBARDINO, ESQ.,
Appearing for the Defendant.

ELIZABETH W. CRUZ, CSR
Official Court Reporter

THE CLERK: Indictment 42-S/82, People of the State of New York against John Cassiliano.

(The district attorney is present.)

THE COURT: I received a call in my chambers. My secretary took a call from Mr. Lombardino. He said he

was a little bit delayed. Mr. Cassiliano is with him, and they should be here momentarily, so as soon as he comes—here he is now. When I said momentarily, I meant it.

(Mr. Lombardino enters the Courtroom.)

MR. LOMBARDINO: I apologize for being—

THE COURT: Thank you for calling. I appreciate that the Court was extended those courtesies.

Where is Mr. Cassiliano?

MR. LOMBARDINO: He is parking the automobile, Judge.

THE COURT: Are we ready to proceed to trial?

MR. MURPHY: The People are ready.

MR. LOMBARDINO: Yes.

There is an application I would like to make for the record, and assuming that is denied, I am ready.

THE COURT: Do you want to wait for your client to be here?

MR. LOMBARDINO: Not really, your Honor. I can make it now with the Court's permission.

Your Honor, I have a number of exhibits dealing with a series of articles that have appeared in a newspaper in Staten Island; I believe it is known as the Advance. There is approximately thirty to fifty articles talking about this particular case, and talking about the problem with toxic

waste.

In addition, I have a flyer from a gentleman by the name of Molinari, who is running for public office.

In that article, it refers to my client as having been indicted and convicted of dumping toxic or permitting the dumping of toxic wastes here on Staten Island.

In light of the publicity, I submit the unfair publicity that has been engendered by a consistent and systematic reporting of this case in the Advance, and, more particularly, the highly inflammatory piece of political literature that has been circulated by this gentleman running for public office, I would respectfully submit at this time that the defendant, unfortunately, cannot get a fair trial, as far as the jurors are concerned, because of what has transpired.

I would ask your Honor to consider this application, and in the interest of justice, to permit an adjournment and/or a continuation of this trial, until some time after December of this year, in the hopes that the public attention that has been received may subside so that we might be able to find jurors who would be fair and impartial and I would, your Honor—if you want to look at the articles, it would take me about five or ten minutes to remove them from my briefcase, and display the amount of articles there are and the depth to which they refer to this case.

THE COURT: I have read them from time to time. You don't have to show me, Mr. Lombardino.

No, your application is denied at this time, Mr. Lombardino.

We are prepared for trial. We are going to trial.

MR. LOMBARDINO: I respectfully except. In light of your Honor's ruling, the defendant is ready to proceed.

MR. MURPHY: Your Honor, the People also have an application. When the superseding indictment was prepared by our typist, there was a typographical error in each of four counts, fifteen, eighteen, twenty-one and twenty-four.

At the present time, the indictment reads as to each of those counts, in the title of the crime charged, "Obstructing governmental administration," penal law 195.05.

The People at this time move to amend each of those counts, fifteen, eighteen, twenty-one and twenty-four, so that the title of the crime charged in each of those counts reads, "Official Misconduct," penal law 195.00. The words charged in the count set forth the charge of official misconduct.

It was simply a typographical e ror in the designation of the crime.

MR. LOMBARDINO: That is without objection, your Honor.

THE COURT: It is going to read, "Official Misconduct" rather than obstructing?

MR. MURPHY: Yes.

MR. LOMBARDINO: Yes. There is another part of the application that now has come to bear, based upon the application made by the People, and that is this, your

Honor.

I have requested, on numerous occasions, that the People furnish to the defendant, in the nature of a bill of particulars, the time and/or the dates of the allegation contained in the indictment.

I have made this application before Judge Owens, it was denied.

Again, I make this application here to the trial court, prior to trial.

I submit that under the case of People versus Ianonne, it is a Court of Appeals case, your Honor, the numerical citation I don't have, that the defendant is at a loss to properly defend himself, when he is unable to ascertain the dates when he is alleged to have committed these crimes.

I would ask again, at this time, that the People furnish me with the approximate dates so that the defendant Cassiliano might properly defend himself in this Courtroom, and without those dates the defendant is at a loss and cannot properly defend himself.

THE COURT: Mr. Murphy?

MR. MURPHY: The People have searched, your Honor, as often as counsel has asked.

We are unable to be any more specific than those dates, which are presently set forth in the indictment, and I submit to your Honor that the requirements of the contents of an indictment say that it is permissible for the People to state that the crimes charged took place during a

period of time as opposed to on a specific date.

THE COURT: That is what you are going to prove at the trial.

MR. MURPHY: Yes, your Honor.

THE COURT: Without specific dates?

MR. MURPHY: That is right.

THE COURT: If he doesn't have them, he doesn't have them.

(The defendant enters the Courtroom.)

THE COURT: If you want to proceed along those lines, you will have to consider a further application if he comes in with a specific date.

MR. LOMBARDINO: The defendant is here now, your Honor.

THE COURT: Any further applications?

MR. MURPHY: Can we approach for a minute, your Honor?

(Discussion held off the record between the Court and counsel.)

THE COURT: Do the People move the case for trial?

MR. MURPHY: The People move the case, indictment 42-S/82, for trial.

MR. LOMBARDINO: The defendant is ready.

THE CLERK: You gentlemen are reminded this is a ten challenge case, plus two for each alternate.

MR. MURPHY: Your Honor, I know that the criminal procedure law requires that I offer so-called Rosario material after the selection of the jury, and before my opening.

I do have a rather large envelope full of Rosario material, and I thought it only fair to counsel to give it over to him at this time.

The material that I am presenting is basically grand jury testimony of witnesses who will be called during the course of this trial, testimony in other proceedings to the extent that the People had transcripts of other proceedings in which witnesses testified, investigative reports relating to statements made by the witnesses whom we intend to call at trial.

(Handing.)

THE COURT: The record so reflects the transfer.

We are going to order a jury panel.

They should be up in a few minutes. Then we will commence the trial.

(Pause.)

(Whereupon jury selection commenced.)

Certified true and correct
s/ E.W. Cruz
Official Court Reporter